NTSB Order No.
EM-33

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 20th day of March 1974.

CHESTER R. BENDER, Commandant, United States Coast Guard

vs.

WALTER S. POLLARD, Appellant

Docket ME-38

OPINION AND ORDER

The appeallant, Walter S. Pollard, has appealed from the decision of the Commandant affirming the revocation of his merchant mariner's document (No. Z-968859-D2) and all other seaman's documents for misconduct aboard the ship.[1]
He was serving at the time as a second cook aboard the USNS MAUMEE, a tanker vessel operated by Marine Transport Lines, Inc., as "Contractor for the U.S. Navy."

Appellant's prior appeal to the Commandant (Appeal No. 1931) was from the initial decision issued by Administrative Law Judge Jerry W. Mitchell, after holding a full evidentiary hearing.[2] Throughout these proceedings, appellant has been represented by his own counsel.

The administrative law judge found that on August 20, 1971, appellant assaulted and battered another crewmember with a dangerous weapon, namely, a knife, in the messhall of the vessel during a voyage at sea and thereby inflicted a serious wound in the left side of the victim--one Stephen Payton, a bedroom-utilityman. Jurisdiction over the case was assumed by the law judge pursuant to

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[1]Review of the Commandant's decision on appeal to the this Board is authoized by 49 U.S.C. 1654(b)(2). The appeal is governed by the Board's rules of procedure set forth in 14 CFR 425.

[2]Copies of the decisions of the Commandant and the law judge (then acting as "hearing examiner") are attached hereto. 5 CFR 930, 37 Fed. Reg. 16787, August 19, 1972.

46 U.S.C. 239(g) and 46 CFR 137,[3] based on the shipping articles of the MAUMEE, which indicated that appellant had produced his merchant mariner's document for recordation thereon at the outset of the voyage.[4] Claims that appellant had acted in self-defense and due to the provocation of Payton were rejected by the law judge. Rather, he concluded that appellant's reaction to a minor disagreement with sudden violence had demonstrated the necessity of removing him "from the close living circumstances and daily contact" with other seamen aboard ship. The law judge thereupon entered the revocation order. He also determined that appellant's 20-year record of commendable prior service and his support of five children were not grounds for reduction of the sanction. On review, the Commandant made essentially the same findings and determinations.

Both of the principals, testifying at the hearing, admitted that they were engaged in a heated argument in the messhall and that there had been previous trouble between them during the voyage. Payton testified, in substance, that appellant left the messhall but returned after a 7- to 10-minute interval, walked up to where he was standing "almost up against the bulkhead, exactly where he left me ... between a table and the bulkhead," saying something to the effect that Payton was "being funny" and, without further warning, stabbed Payton with a knife, which had been concealed under his apron (Tr. 21-23). To Payton, it appeared to be a black pocketknife (Tr. 37).

Appellant provided a somewhat conflicting version, although admitting that he was armed with a knife and had used it to inflict the injury. He testfied, however, that it was an ordinary tableknife, which he was carrying for shaving purposes, and that he did not leave the messhall but struck during the heat of the argument, after Payton had threatened to "break my jaw, straighten my legs and whip my so and so" outside the messhall, had repeated these threats, and jumped up out of his seat. Thereafter, referring to the immediate occasion for his attack, he testified that Payton "demonstrated in his way that he was going to do me

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[3]Regulations of the Commandant governing suspension and revocation proceedings against seamen under the statute.

[4]Tr.11. A certified copy of pertinent extracts was received in evidence without objection (Tr. I.I. Exh. 1). Appellant has not appealed from this determination of the law judge nor challenged the supporting findings that possession of his document was "required as a condition incident to employment on board" the MAUMEE, and that he was thus acting under its authority at the time of the offense. 46 CFR 137.01-35.

some harm first. So instead of him doing me harm first I done it to him, because I was afraid for myself ..." (TR. 51-52). His sworn testimony contains no further description of Payton's final action or gesture.

In his brief on appeal,[5] appellant contends that Payton's testimony is inhereently unreliable, conflicts with his own, and since they were the only eyewitnesses who testified, "there remains no substantial evidence to porve that [he] was not acting in self defense in the incident...." His remaining contention is that the instant proceeding has subjected him to double jeopardy, based on evidence that he was placed under arrst after this incident and charged with the crime of assaulting Payton with a dangerous weapon, in violation of 18 U.S.C. 11O(c), but was released after a grand jury failed to return the indictment.[6] Counsel for the Commandant has filed a reply brief opposing the appeal and urging affirmance of the order.

Upon consideration of the briefs of the parties and the entire record, we have concluded that the findings of the law judge and the Commandant are supported by substantial evidence of a probative and reliable character. We adopt their findings, unless modified herein, as our own. Moreover, we affirm the order of revocation for appellant's misconduct, in accordance with Coast Guard regulations implementing 46 U.S.C. 239(g).[7]

It is disputed by appellant that Payton suffered a serious injury from the knife wound, requiring his evacuation to a hospital ahore for surgery and extended treatment. In order to justify or excuse his use of sucg force, appellant was required to have a reasonable fear or apprehension that Payton was about to inflict serious bodily haarm upon him.[8] His sworn testimony provides no

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[5]Appellant's request for oral argument, made without a statement of his reasons therefor, lacks good cause and is hereby denied. 14 CFR 425.25.

[6]This was adduced in the form of a letter to appellant's counsel from the clerk of the U.S. District Court for Maine, dated Septmber 23, 1971 (Tr. Respondent's Exhibit 1).

[7]The offense of assault with a dangerous weapon (injury) is listed among those seamen's offenses for which the revocation of their documents is sought by the Coast Guard, and for which that sanction is warranted for the first offense. 46 CFR 137.03-5(a), (b)(1); 137.20-165, Group F.

[8]6 C.J.S. Assault and Battery § § 18, 92.

such indication. Rather, as the law judge found, it shows that appellant had the opportunity to retreat at least until the point of his ambigious reference to Payton's final action or gesture. The ambiguity is clarified by appellant's reply to the log entry of the offense aboard the MAUMEE on the day following the incident, wherein he stated that Payton "put up both hands like he was going to hit me." Even there, however, he added that Payton's "getting hurt ... would never happen of [he] hadn't" used a foul word in referring to his "five children again. It would haave been alright what he said about me, but my love one's was "inviole."[9]

Although we disagree with the law judge's interpretation of this description of Payton's gesture as "not an aggressive pose, but rather one of surrender," we find nonetheless that appellant's reply to the log entry fails to show in definite terms that he was reacting in fear of Payton's hitting him. On the contrary, it actually indicates that his reaction was produced by his anger at Payton's alleged slur on his children. We have no reason to reject Payton's testimony because of this imprecise evidence of appellant's state of mind when he resorted to violence.

We also note that Payton withstood cross-examination in these areas, denying that he had used the foul language or raised his hand at appellant in the manner described (Tr. 33, 38). Far from finding Payton's testimony unreliable, it is the testimony of appellant that strains our credulity to the effect that he was carrying the knife an 'pen view, and that it was a tableknife with a dull edge with which he intended to shave himself (Tr. 65, 60.)[10] Upon review of the record, therefore, we find that Payton's testimony clearly prevailed in establishing that he was knifed by appellant without justification or excuse and that appellant was an aggressor not acting upon legally sufficient provocation. In our view, the record lends no support to appellant's contention that he was acting in self-defense.

The claim of double jeopardy is equally unfounded. Appellant's evidence does not establish that he was tried

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[9]Tr. I.O. Exh. 2C.

[10]Unaccountably, the law judge declined to make credibility findings, although observing that appellant, as a witness, was "aggressive, evasive on crucial matters, and very self-justifying," whereas Payton's "manner and attitutde is sincere and without guile," and indicating that of he "were required" to choose between them, he would believe Payton.

criminally for the same offense.[11] For this reason alone, the rule against double jeopardy is inapplicable. Assuming, arguendo, that appellant were tried criminally for the same offense, we would conclude nonetheless that the revocation of his merchant mariner's document constitutes a remedial sanction not prohibited by the rule.[12]

Appellant argues that the sanction will deprive him of the livelihood he has pursued for some 20 years to support himself and his family and that this amounts to criminal punishment "just as surely as if he were being fined or jailed." The nature of the sanction is not affected by the economic hardship it may entail, or the undoubted severity of such consequences for appellant in this case.[13] It is the sole purpose of this sanction to remove appellant from his erstwhile occupation for thee protection of other seamen. The administrative record demonstrates that, under verbal provocation which must be regarded as minor in terms of the ordinary stresses of a shipboard working environment, appellant is predisposed to react with sudden and unreasoning violence. The revocation action is thus designed as an effective remedy, assuring against the repetition of similiar offenses by appellant, in like circumstances, during future voyages.

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal be and it hereby is denied; and

2. The order of the Commandant affirming the revocation of appellant's seaman's documents be and it hereby is affirmed.

REED, Chairman, THAYER, BURGESS, and HALEY, Members of the

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[11]Jeopardy does not attach to proceeedings of a grand jury or before a committing magistrate. 21 AM. Jur. 2d § 177, and cases cited therein.

[12]Helvering v. Mitchell, 303 U.S. 391, 399, 58 S. Ct. 630 (1938); Marcus v. Hess, 317 U.SC. 537, 548, 63 S. Ct. 379 (1942). In Helvering, the Court states: "Remedial sanctions may be of varying types. One which is characteristically free of the punitive criminal element is revocation of a privilege voluntarily granted."

[13]"The question whether a penalty may be administratively imposed does not depend upon its severity. An agency in revoking a license may exercise a power of life and death over a valuable business, but ordinarily it may not impose a ten-dollar criminal fine." 1 Davis, Administrative Law Treatise § 2.13.

Board, concurred in the above opinion and order. McADAMS, Member was absent, not voting.

(SEAL)